

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**NOV 03 2005**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID DOUGLAS AVERY,

Defendant - Appellant.

No. 04-10280

D.C. No. CR-02-00113-DWH

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Nevada  
David Warner Hagen, District Judge, Presiding

Argued and Submitted October 21, 2005  
San Francisco, California

Before: WALLACE, TROTT, and RYMER, Circuit Judges.

David Avery was convicted for being a felon in possession of a firearm, enhanced by the Armed Career Criminal provisions, and now appeals the denial of his motion to suppress the handgun. For the reasons below, we affirm but grant a limited Ameline remand.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Considering the totality of the circumstances, the police officer had reasonable suspicion to effect a Terry stop of Avery. See Terry v. Ohio, 392 U.S. 1 (1968). The casino security guard had informed the officer of Avery's suspicious behavior, and the officer independently observed Avery's fanny pack and suspected it contained a handgun. These facts, in context, provided the officer with sufficient reasonable suspicion to effect the Terry stop.

After considering the factors in Washington v. Lambert, 98 F.3d 1181, 1189-90 (9th Cir. 1996), we conclude the officer's act of handcuffing Avery did not convert the Terry stop into an arrest. First, Avery did not cooperate with the officer. Second, Avery kept looking from side to side and attempted to break the officer's hold, which indicate a reasonable possibility of flight. Third, the officer suspected Avery was carrying a concealed firearm, which creates a reasonable possibility of danger. Finally, when the officer initiated the Terry stop, he was the only officer at the scene. Considering the totality of these factors, it was reasonable for the officer to handcuff Avery, and thus the act of handcuffing Avery did not convert the Terry stop into an arrest.

The admission of Avery's prior convictions under the Armed Career Criminal Act did not violate Apprendi. "[W]e have repeatedly rejected Apprendi

challenges to the ACCA.” United States v. Smith, 390 F.3d 661, 666 (9th Cir. 2004).

The district court sentenced Avery before the United States Supreme Court held the Sentencing Guidelines were advisory in United States v. Booker, 125 S.Ct. 738, 764 (2005). The record does not indicate how the district court would have proceeded if it had known the Guidelines were merely advisory. Thus, we grant a limited remand under United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (en banc).

**AFFIRMED IN PART; REMANDED IN PART.**